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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINA RENEE JOHNSON,

Defendant and Appellant.

D073338

(Super. Ct. No. SCD241227)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Charles C. Ragland, Alana Butler and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Regina Renee Johnson of second degree murder of her spouse Ruben Johnson and their daughter, Aaliyah Johnson (Pen. Code,<sup>1</sup> § 187, subd. (a)). As to both counts, it found true allegations that Johnson intentionally and personally discharged a firearm and proximately caused the victims' deaths. (§ 12022.53, subd. (d).) The court sentenced Johnson to 80 years to life in prison as follows: 15 years to life for each of the murders and 25 years to life on each firearm enhancement. The court awarded her 1,995 days of actual time served. It awarded no presentence conduct credits because section 2933.2 bars them for murder convictions.

Johnson contends: (1) the court abused its discretion in finding her competent to stand trial and violated her constitutional right to due process by failing to hold another competency hearing just before the preliminary hearing commenced; (2) this court should remand this matter for the trial court to consider her eligibility for pretrial diversion for persons with mental illness as provided for in section 1001.36; (3) this court should also remand for the court to exercise its discretion regarding whether to dismiss the firearm enhancements under the amended version of section 112022.53; and (4) this court should amend the abstract of judgment to reflect an award of presentence conduct credits under Proposition 57, which she maintains overruled section 2933.2's bar to such credits. We affirm the judgment, but remand for the trial court to exercise its discretion on whether to dismiss the firearm enhancements.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

## FACTUAL AND PROCEDURAL BACKGROUND

As this case raises only legal questions, we need not set forth the facts regarding the underlying convictions. Suffice to say that in May 2012, Johnson killed her husband and daughter.

In May 2013, the court suspended legal proceedings against Johnson under section 1368 in order for an expert to evaluate her mental competence. In August 2013, Johnson was found not competent to stand trial, based upon a diagnosis of major depressive disorder, and committed to Patton State Hospital. In October 2015, Johnson was found competent to stand trial. (§ 1372.) In December 2015, defense counsel stipulated to Johnson's competency to stand trial.

In March 2016, on the day scheduled for the preliminary hearing, defense counsel moved under section 1368 for the court to suspend proceedings and order Johnson's mental health reevaluated. He supported his motion by describing his recent visits with Johnson: "What generally happens, with a fair amount of paranoia, is that I am told that I already represented certain things, and they're generally things which are not accurate and I have to try to explain to [Johnson] that I didn't say the things, but she's sure I did and we argue about that, what it means. [¶] Once we can hopefully clear that away and start again, we embark on a conversation, for example, her exposure or the possible results that could come from a trial, what hospitalization would mean with a not guilty by reason of insanity plea. I don't think she is being indecisive. I think she genuinely cannot understand her options or understands [*sic*] the information."

Defense counsel opined Johnson suffered from "entrenched delusions"; most notably, she seemingly believed "that one of the victims is living and walking among us." Defense counsel also pointed out Johnson was suffering from a "whole series of facial tics and leg movements which seem to be involuntary, which are professionally labeled as dyskinesia, but they're understood to be a side effect from the antipsychotic medications that she is under, both antidepressants and antipsychotic medications." Defense counsel concluded, "Miss Johnson is not grasping, in my opinion, the legal nature of the case, and even if she is, she's certainly not able to help me."

The court took a recess to read two mental health professionals' reports. One was an October 2015 report from Dr. Leong, who stated: "Overall, Ms. Johnson possesses a basic comprehension of her legal predicament and the associated legal process. If she did not know something she could be educated on the missing knowledge. As previously emphasized, Ms. Johnson can be reluctant to demonstrate her awareness of the ongoing legal case. It is quite understandable that an individual would not want to participate in a discussion of such an emotionally charged subject involving the deaths/killings of one's spouse and child. This reluctance appeared to be under her volitional control as demonstrated during my face-to-face contact and not the result of any mental disorder at this time. Consequently, at this time, her mental condition was such that she possesses sufficient capacity to understand the nature of the criminal proceedings." Dr. Leong concluded that "[Johnson's] mental condition was such that she possesses sufficient capacity to rationally assist counsel in conducting a defense." He also concluded Johnson was competent to stand trial.

Dr. Abrams stated in a March 2016 letter: "I agree with Dr. Leong that Ms. Johnson is able to understand the charges against her." Dr. Abrams added, "Ms. Johnson continues to express an inability to remember any details about the alleged crimes during my interview. . . . The full records from Patton [State Hospital] will need to be reviewed to better assess the reasons for this amnesia. On my recent evaluation, Ms. Johnson continued to express paranoid thinking. Ms. Johnson was improved from the last visit I had with her . . . . If [her] amnesia is from her mental illness, it might perhaps improve with further treatment. Amnesia by itself is not solely a basis for trial incompetence, but in this case the amnesia is likely related to Ms. Johnson's severe mental illness."

The court ruled there was no doubt Johnson was competent to stand trial: "When [Johnson] left Patton State Hospital, Dr. Leong was of the opinion that she was not suffering from any kind of delusions that would prevent her from assisting her counsel in the performance of the defense. She had—her memory was good, she was up to date on current affairs, she knew what was going on in all cases. [¶] And what you told me today at this hearing, [defense counsel], is that while she understands the proceedings, the nature of the proceedings, you have some question about her ability to assist you in preparing the defense because of amnesia, and that is also one of the features that [is] mentioned by Dr. Abrams, talking about amnesia. [¶] But it does not appear, at least to the court, that the amnesia is a result of a mental illness, and I—I think that the amnesia is selective in terms of what it is that she remembers, what she wants to remember." The court proceeded to conduct the preliminary hearing, and Johnson was bound over on the murder charges.

In June 2016, the court addressed Johnson's motion to set aside the information under section 995, brought on grounds she was mentally incompetent around the time of the preliminary hearing. The court concluded: "I just don't think there was sufficient evidence at the prelim[inary hearing] that would justify" suspending proceedings for another mental evaluation of Johnson under section 1368.

That same day, Johnson again requested a section 1368 hearing. To resolve the question of whether to suspend proceedings and order Johnson to undergo a new mental evaluation, the court questioned defense counsel about Johnson's mental state:

"The Court: Is there something today that, in addition to what we have heard already, you want to let me know about?

"[Defense counsel:] Yes, your Honor. I would reiterate just very briefly what the content was at the time of the preliminary hearing because I don't think that in any way we are starting yet again all over. The facts that I have experienced since [Johnson's] return is [*sic*] still relevant to the overall picture today. We are talking about—I think we are up to seven visits at roughly two hours each here. During the visits, as I have explained now and will explain again, there are some things that Ms. Johnson does well, and there are some things she cannot do which are not nuances.

"The Court: Be more specific.

"[Defense counsel:] Yes. Her understanding or her ability to understand what it means to be in a state hospital versus what it means to be in prison. Her understanding of exposure and the way we crunch the numbers where charges and allegations are concerned. I'm not talking about one-third the middle term or the more complicated

rules. I'm talking about the basic math so that she can compare and contrast things like a determinate term.

... [¶] ... [¶]

THE COURT: Okay.

[Defense Counsel:] But there are additional layers. Again, I'll grant you that I wouldn't expect all clients to immediately understand the difference between voluntary and involuntary and second degree and so forth. But in my experience, there is a time at which I do expect them to begin to follow me so we can make some basic decisions. That, in the course of all of these visits, has not occurred. Woven through that, as I mentioned before, is her belief that one of the victims is living. I can't get past or around or through or under or over that fact in order to engage in the appropriate decision-making where that is concerned."

The court asked defense counsel another series of questions to clarify Johnson's level of comprehension of the case against her; specifically, whether Johnson knew who defense counsel was, the charges against her, the judge's and the jury's duties, and that the issue at trial was her guilt or innocence. Defense counsel answered all questions in the affirmative.

The court ruled: "Based on what I heard today, I am going to deny the request to commence any kind of [section] 1368 proceedings. That, of course, is without prejudice if something changes. As the cases say, this is not a static thing. People can go in and out of competency, but as of today, I'm not seeing anything that would warrant

suspending the proceedings." Thereafter trial commenced, and defense counsel made no further claims under section 1368 regarding Johnson's mental competency.

## DISCUSSION

### I. *Johnson's Competence to Stand Trial*

Johnson contends the trial court abused its discretion in finding her competent to stand trial: "[T]he court heard more than sufficient evidence from counsel to conclude, both before the preliminary hearing and after, that appellant was unable to assist in her own defense. Not only did [Johnson] lack understanding of basic information counsel attempted to convey, but she actually believed one of the named victims in the murder counts was not dead."

A defendant is presumed mentally competent unless he or she proves otherwise by a preponderance of the evidence. (§ 1369, subd. (f); *People v. Blacksher* (2011) 52 Cal.4th 769, 797; *People v. Lawley* (2002) 27 Cal.4th 102, 131.) In *People v. Jones* (1991) 53 Cal.3d 1115, the California Supreme Court summarized the applicable law: "A defendant who, as a result of mental disorder or developmental disability, is 'unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner,' is incompetent to stand trial. (§ 1367.) When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. [Citation.] Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competence to stand trial. . . . [¶] When a competency hearing has already been held and the defendant has been found competent to stand trial, however, a trial court need not suspend proceedings to conduct a second

competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding." (*Id.* at pp. 1152-1153; accord, *People v. Rodas* (2018) 6 Cal.5th 219, 230-231.) The evidentiary standard by which the trial court evaluates defense counsel's showing is substantial evidence. If counsel presents a substantial change of circumstances or new evidence giving rise to a serious doubt about the validity of the original competency finding, the trial court must suspend the criminal proceeding and reinstate competency proceedings. (*Rodas, supra*, 6 Cal.5th at p. 231.)

"We apply a deferential standard of review to a trial court's ruling concerning whether another competency hearing must be held. [Citation.] We review such a determination for substantial evidence in support of it." (*People v. Huggins* (2006) 38 Cal.4th 175, 220.) "More is required than just bizarre actions or statements by the defendant to raise a doubt of competency. [Citations.] In addition, a reviewing court generally gives great deference to a trial court's decision whether to hold a competency hearing." (*People v. Marshall* (1997) 15 Cal.4th 1, 33.)

Applying these standards, we conclude that at the hearing held just before Johnson's preliminary hearing, defense counsel did not demonstrate a substantial change of circumstances had occurred. (*People v. Jones, supra*, 53 Cal.3d at p. 1154.) Specifically, defense counsel's argument that Johnson suffered from dyskinesia was not material to the competency inquiry because there was no claim or showing that this specific diagnosis rendered Johnson incapable of understanding the nature of the proceedings or of assisting her attorney. Moreover, the fact that Johnson made bizarre

statements indicating one of the victims was still alive did not, alone, make her incompetent to stand trial. (Accord, *In re Sims* (2018) 27 Cal.App.5th 195, 209; *People v. Murdoch* (2011) 194 Cal.App.4th 230, 236-237; *People v. Williams* (1965) 235 Cal.App.2d 389, 398, fn. 3.) In evaluating defense counsel's claim that Johnson did not appear to grasp her legal exposure or the possible results of trial, the court reviewed Dr. Leong's letter. The court could reasonably have found that there were no substantially changed circumstances or new evidence because Dr. Leong had already concluded Johnson's reluctance to discuss the emotionally charged subject involving the killings of her husband and child did not result from any mental disorder; rather, her amnesia was under her volitional control. "The prior finding was based on a thorough inquiry into defendant's competency, and the evaluations made at that time and the verdict of competency must be viewed as a baseline that, absent a preliminary showing of substantially changed circumstances, eliminated the need to start the process anew." (*People v. Huggins, supra*, 38 Cal.4th at p. 220.) We therefore conclude substantial evidence—in the form of Dr. Leong's report—supported the court's decision declining to hold a new competency hearing.

In considering the postpreliminary hearing request for a competency hearing, the court asked defense counsel a series of questions to ascertain Johnson's ability to understand the case against her and, based on those responses, the court did not have a doubt about her competence. In light of the entire record, we conclude the court did not abuse its discretion in declining to order a new competency evaluation. Further, the court expressed its willingness to revisit the issue if defense counsel brought another motion;

but defense counsel never did so. (Accord, *People v. Lightsey* (2012) 54 Cal.4th 668, 690 [even though defendant appeared competent before trial, trial court must reconsider if change in competence during trial]; *Murdoch*, at pp. 234, 237 [trial court was required to reexamine competency during trial because defendant stopped taking medicine and told jury that victim was an angel, not a human].)

## II. *Pretrial Mental Health Diversion Under Section 1001.36*

Effective June 27, 2018, the Legislature created a pretrial diversion program for defendants suffering from a qualifying mental disorder. (§ 1001.36, subds. (a) & (b)(1).) One of the purposes of the legislation is to promote "[i]ncreased diversion of individuals with mental disorders . . . while protecting public safety." (§ 1001.35, subd. (a).) "[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) A trial court may grant pretrial diversion if all the following eligibility criteria are satisfied: (1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder; (2) the "mental disorder was a significant factor in the commission of the charged offense"; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(1)(A)-(F).) In September 2018, the Legislature amended section 1001.36, effective January 1, 2019, to eliminate a

defendant's eligibility for diversion if the defendant is charged with certain offenses, including murder. (§ 1001.36, subd. (b)(2)(A).)

Johnson contends she is entitled to a diversion hearing under section 1001.36 because although she was sentenced in November 2017, the Legislature intended the statute to apply to cases pending on appeal. The People disagree, arguing section 1001.36's language demonstrates the Legislature intended the law to operate prospectively, and not to a case like this one that was already adjudicated. The People contend that even assuming section 1001.36's amendments are retroactive, a remand is futile because Johnson is ineligible for mental health diversion, as she was convicted of murder.

Generally, amendments to the Penal Code are presumed to apply prospectively unless they state otherwise. (See § 3.) Nonetheless, the presumption against retroactivity does not apply when the Legislature reduces the punishment for criminal conduct. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Courts are divided on whether section 1001.36 applies retroactively to all nonfinal judgments; however, this court has concluded that it does. (*People v. Burns* (2019) 38 Cal.App.5th 776, 785.)<sup>2</sup> Another court has held that section 1001.36's amendment applies retroactively to pending appeals. (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1191.)

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<sup>2</sup> Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220 [section 1001.36 retroactive]; *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1121, review granted Oct. 9, 2019, S257049 [same]; and *People v. Hughes* (2019) 39 Cal.App.5th 886, 896, review granted Nov. 26, 2019, S258541 [same] with *People v. Craine* (2019) 35 Cal.App.5th 744, 749, review granted Sept. 11, 2019, S256671 [section 1001.36 not retroactive] and *People v. Torres* (2019) 39 Cal.App.5th 849, 855 [same].

But because Johnson was convicted of two counts of second degree murder, she is statutorily ineligible for mental health diversion. Amended section 1001.36 provides that a defendant may not be placed into a diversion program if charged with certain specified crimes, including murder. (§ 1001.36, subd. (b)(2)(A).) Thus, we reject Johnson's contention we should remand this case for the trial court to consider her eligibility for pretrial diversion for persons with mental illness.

Johnson contends that applying amended section 1001.36 here violates ex post facto and due process protections under the federal and state Constitutions. We disagree. The federal and state ex post facto clauses (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9) prohibit legislation " 'which makes more burdensome the punishment for a crime, after its commission.' " (*Collins v. Youngblood* (1990) 497 U.S. 37, 42; *People v. McVickers* (1992) 4 Cal.4th 81, 84.) The ex post facto prohibition is intended to ensure that individuals have " 'fair warning' about the effect of criminal statutes [and] 'restricts governmental power by restraining arbitrary and potentially vindictive legislation.' " (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 267.)

Here, ex post facto concerns do not apply because when Johnson committed her crimes in 2012, she could not have relied on the possibility of receiving pretrial mental health diversion because the law was not yet passed. Moreover, the Legislature's amendment of section 1001.36 to eliminate eligibility for defendants charged with murder did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses with which Johnson was charged. (See *People v. White* (2017) 2 Cal.5th 349, 360.) Johnson was subject to the same punishment when she

committed her offenses as she was after the Legislature narrowed the scope of defendants eligible for diversion. Thus, amended section 1001.36 does not violate the ex post facto clauses of the state or federal Constitutions. (Accord, *People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1054, review granted Aug. 14, 2019, No. S256113.)

### III. *Gun Enhancements*

The People concede, and we agree, a remand is necessary for the trial court to exercise its discretion to strike the gun enhancements.

Senate Bill No. 620, effective January 1, 2018, permits a trial court in its discretion to strike firearm enhancements imposed under sections 12022.5 and 12022.53. (§§ 12022.5, subd. (c) & 12022.53, subd. (h); Stats. 2017, ch. 682, §§ 1, 2.) The statutes provide that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c) & 12022.53, subd. (h).) The amended statutes apply retroactively to defendants whose sentences were not final when Senate Bill No. 620 came into effect. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091; see *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56 [courts have unanimously concluded that Senate Bill No. 620's grant of discretion applies retroactively to all nonfinal convictions].) "[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [remand is

required when "the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion"].) Here, the court did not clearly indicate a refusal to strike the enhancements.

#### IV. *Custody Credits under Section 2933.2*

Johnson's probation report stated that under section 2933.2, she was ineligible for presentence credits. The court accordingly awarded Johnson credit for 1,995 days in actual custody, but "zero days per [section] 2933.2."

Section 2933.2 subdivision (a) states: "Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder . . . shall not accrue any credit, as specified in Section 2933 or Section 2933.05." Section 2933.2 subdivision (c) states: "Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a)." Section 2933.2 is an exception to the general presentence custody credit scheme. It denies such credits to convicted murderers. (*People v. Chism* (2014) 58 Cal.4th 1266, 1336.)

Johnson contends: "Nothing in Proposition 57 addresses whether it is intended to apply to pre-sentence conduct credits. It is clear, however, that with the intention of the voters and the implementation by [California Department of Corrections and Rehabilitation], it does apply to those formerly denied conduct credits by section 2933.2, subdivision (a), effectively repealing that subdivision and providing inmates up to 20 percent credit for good conduct. The question, therefore, is whether all of section 2933.2

must be considered void as there is no rational basis for preventing those who have not even yet been convicted of a crime, from being rewarded for good behavior."<sup>3</sup> Citing no authority for her interpretation, she answers her own question and asserts that Proposition 57 repealed section 2933.2 subdivision (c) as well. She argues that to construe Proposition 57 as repealing section 2933.2, subdivision (a) regarding the credits accrued by convicted murderers in prison but not section 2933.2, subdivision (c) with respect to those in prejudgment custody would raise "constitutional difficulties" under the Equal protection clauses of the federal and state Constitutions.

Proposition 57, which was passed by the electorate and implemented as Article 1, section 32 of the California Constitution provides: "The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements." The implementing regulations state: "Credit applied prior to sentencing is awarded by the sentencing court pursuant to sections 2900.1, 2900.5, 2933.1 and 4019 of the Penal Code." (Cal. Code Regs., tit. 15, § 3043.1.) The California Supreme Court has held that "California's Department of Corrections and Rehabilitation . . . does not determine and award presentence credits; the sentencing court does." (*People v. Brown* (2012) 54 Cal.4th 314, 321.) Proposition 57

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<sup>3</sup> Johnson supports her claim that Proposition 57 repealed section 2933.2 subdivision (a) by relying on this statement published by the California Department of Corrections and Rehabilitation on its website: "Credit-earning opportunities are available to all inmates . . . . Inmates not eligible for credits under Proposition 57 include condemned inmates and those serving sentences of life without the possibility of parole." (See <https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq>)

refers only to the Department of Corrections and Rehabilitation's power to award the above enumerated credits. We therefore conclude that because Proposition 57 by its terms does not apply to presentence credits, Johnson's contention that Proposition 57 repealed section 2933.2 subdivision (c) lacks merit.

As for Johnson's equal protection argument, the California Supreme Court has stated: "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) It also has held: "A pretrial detainee is not similarly situated to a state prison inmate." (*In re Martinez* (2003) 30 Cal.4th 29, 36.)

The California Supreme Court has further held: " 'Equal protection does not require equality of the ratio of conduct credit to time served. [Citation.]' [Citation.] The constitutional guarantee of equal protection does not mandate uniform operation of the law with respect to different persons or classes. [Citation.] '[T]he Legislature may make a reasonable classification of persons and pass special legislation applying to certain classes. The classification cannot be arbitrary, but must be based on some difference in the classes having a substantial relation to a legitimate objective to be accomplished.' " (*People v. Heard* (1993) 18 Cal.App.4th 1025, 1029-1030.) It has explained, with examples from different statutes, that slightly disparate schemes for awarding conduct credits may be justifiable and therefore do not violate the constitutional right to equal protection of the laws: "Pretrial felony detainees and state prison inmates are not similarly situated with respect to the purposes of the custody credit statutes. While state

prison inmates are conclusively guilty and presumptively in need of rehabilitation, pretrial felony detainees are presumptively innocent and may not require rehabilitation. [Citations.] The difficulty of establishing prison-style work programs in county jails for pretrial detainees—who may make bail, or have work programs interrupted by court appearances and other obligations—further distinguishes pretrial detainees from state prisoners and justifies the slightly disparate scheme for awarding conduct credit to the former class." (*Id.* at pp. 1030-1031.) The same analysis applies here, and we find no invidious classification or equal protection violation in the calculation of Johnson's presentence conduct credits. We accordingly conclude that Johnson's contention fails.

#### DISPOSITION

The sentence is vacated and the matter remanded for the trial court to exercise its discretion to consider whether to strike the firearm use enhancements (§ 12022.5, subd.

(a)), and to resentence Johnson. If the court elects not to strike or dismiss the enhancements, it shall reinstate the sentence. The judgment is affirmed in all other respects. The court is directed to prepare an amended abstract of judgment and forward certified copies to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.